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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-~~94~~3 - 1994

JULIAN VELLA,

Petitioner,

vs.

FORD MOTOR COMPANY,

Respondent.

BRIEF OF PETITIONER

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1944

JULIAN VELLA,

Petitioner,

vs.

FORD MOTOR COMPANY,

Respondent.

BRIEF OF PETITIONER

OPINIONS BELOW

The Opinion of the Sixth Circuit Court of Appeals (30a) entered on April 8, 1974 affirming in part and reversing in part the Opinion and Order of the District Court for the Eastern District of Michigan, Southern Division, with mandate for entry of Order of Dismissal was decided without published opinion, 495 F2d 1374. The Opinion of the District Court denying respondent's Motion (22a) for Judgment Non Obstante Verdicto and denying petitioner's motion (24a) for attorney fees for prosecuting his claim by counsel for maintenance and cure benefits was delivered from the bench on July 17, 1972 and is unpublished.

STATEMENT OF JURISDICTION

The Opinion of the Sixth Circuit Court of Appeals affirming in part and reversing in part with mandate for entry of Order of Dismissal was filed on April 8, 1974. The Order of the District Court pursuant to mandate of the Sixth Circuit Court of Appeals was entered on May 7, 1974.

Jurisdiction of this Court is invoked under 28 USC 1254(1).

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit was docketed on July 8, 1974 with Petition granted on October 21, 1974.

DRAFT CONVENTION INVOLVED

The case involves 54 Stat. 1693, Article 4, Paragraph 1:

> "The shipowner shall be liable to defray the expense of medical care and maintenance until the sick or injured person has been cured, or until the sickness or incapacity has been declared of a permanent character."

QUESTION PRESENTED

WHETHER A DISABLED SEAMAN WHO CONTRACTED BY TRAUMA A PERMANENT DISEASE WHILE IN THE SERVICE OF A VESSEL IS ENTITLED TO MAINTENANCE AND CURE PAYMENTS DURING THE INTERIM BETWEEN OCCURRENCE OF THE INCIDENT AND THE TIME THE DISEASE WAS MEDICALLY DIAGNOSED AND DECLARED INCURABLE.

STATEMENT OF THE CASE

Petitioner, an American seaman, was injured in a fall in the engine room of the SS Robert S. MacNamara while on watch. (19a). The fall occurred April 4, 1968 (27a) while petitioner was in the process of replacing a steel deck plate. (27a). He slipped on oil which had accumulated from leaks of auxiliary machinery. (27a) Petitioner remained on board for several weeks before he finally departed the vessel on June 29, 1968, at which time he was directed by his superiors to be examined by respondent's own salaried physician at a dockside clinic at Ford's River Rouge premises. Respondent's physician, Dr. Laderach, diagnosed petitioner's physical condition as having nerve damage to the head (79a) but failed to perform tests to diagnose petitioner's actual condition of a vestibular labyrinthine disorder. (82a). The U.S. Public Health Service Clinic also failed to conduct tests to cause a diagnostic impression of the vestibular disease petitioner was suffering. (51a)

At about the time the trial commenced on March 20, 1972, Dr. Edward Richard Heil, an otolaryngologist, examined petitioner (22a) and found that he did suffer from a vestibular labyrinthine disorder and on March 27, 1972 Dr. Heil testified at the trial as to his diagnosis and declared that the disease was incurable. (96a) Among the physicians who testified at the trial, only Dr. Heil diagnosed and declared the disease incurable (21a).

Petitioner instituted suit in the United States District Court for the Eastern District of Michigan, Southern Division with Counts under the Jones Act, 46 USC §688 *et seq.*, unseaworthiness under the General Maritime Law and for maintenance and cure (2a). The issues of liability were

decided adversely to petitioner, with a jury returning a verdict for petitioner on the maintenance and cure claim awarding Eight ($8.00) Dollars per day from June 29, 1968 through June 29, 1970. (14a-15a)

Respondent moved for Judgment Non Obstante Verdicto relative to the maintenance and cure award (19a) and petitioner moved the trial court for an award of attorney fees for prosecuting the claim for maintenance and cure, (22a) whereupon the trial court denied both motions. (22a & 24a). Respondent thereafter appealed to the Sixth Circuit Court of Appeals (26a) with the result of reversal of the trial court of denial of respondent's motion for Judgment Non Obstante Verdicto relative to the maintenance and cure award. (31a)

Petitioner sought and was granted the Writ of Certiorari to the Sixth Circuit Court of Appeals on October 21, 1974.

ARGUMENT

I
MEANING AND ORIGIN OF THE DOCTRINE

Welfare measures for sick and injured seamen have been a concern of Maritime nations antedating the Battle of Hastings and long before days of the windjammers. Indeed, the doctrine of maintenance and cure is rooted in "The Common Law of the Sea" in the ancient sea codes of the Middle Ages.

Provisions for maintenance, which is sustenance, and cure, meaning care, of an ill or injured seaman were provided by ancient Laws of Wisbuy, The Laws of Oleron, The Dantzic Ship-Laws, The Laws of the Hanse Towns as well as the Marine Ordinances of Louis XIV. 2 *Norris, The Law of Seamen,* §540-41 (3 ed. 1970).

Maintenance and cure is not a fault doctrine; the concept derives from general maritime and admiralty law, *Calmar S.S. Corp.* v *Taylor,* 303 US 525, 527 (1938), and the obligation rests upon the shipowner and the vessel.

To a seaman maintenance and cure is virtually what workmen's compensation is to the land worker. This social doctrine arises out of dire need and our nation's attending concern in application of the doctrine is contained in the classic opinion by Justice Storey handed down in 1823:

> "Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour. They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence. If some provision be not made for them in sickness at the expense of the ship, they must often in foreign ports

suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment. Their common earnings in many instances are wholly inadequate to provide for the expenses of sickness; and if liable to be so applied, the great motives for good behavior might be ordinarily taken away by pledging their future as well as past wages for the redemption of the debt. In many voyages, particularly those to the West Indies, the whole wages are often insufficient to meet the expenses occasioned by the perilous diseases of those insalubrious climates."

• • •

"On the other hand, if these expenses are a charge upon the ship, the interest of the owner will be immediately connected with that of the seamen. The master will watch over their health with vigilance and fidelity. He will take the best methods, as well to prevent diseases, as to ensure a speedy recovery from them. He will never be tempted to abandon the sick to their forlorn fate; but his duty, combining with the interest of his owner, will lead him to succor their distress and shed a cheering kindness over the anxious hours of suffering and despondency." *Harden* v *Gordon,* F Cas No 6047 (CC Me 1823).

Policy aspects of maintenance and cure provisions for sick and injured seamen were enunciated in recent times by this Court:

> "If men are to go down to the sea in ships and face the perils of the ocean, those who employ them must be solicitous of their welfare. Maintenance and cure is an inducement on the part of the masters and owners to be solicitous of the health, safety, and welfare of seamen while they are in the service. It gives a degree of security, though injury or sickness be incurred. It gives service in the merchant marine a dignity equal to the important function it performs."

> *Farrell* v *United States,* 336 US 511, 524 (1949), dissenting opinion by Mr. Justice Douglas.

The doctrine is based on necessity and humanity and arises out of the nature of a seaman's employment in relationship to the vessel, *Cortes* v *Baltimore Insular Line,* 287 US 367 (1932), and originally had no bearing as to the express terms of the seaman's contract with the employer. Now, the provision for maintenance and cure is embodied within the collective bargaining agreements between unions and the shipowners.

Humanitarian aspects of the ancient doctrine equating simple justice to an injured seaman stricken in the service of the vessel have been advanced and liberalized by our courts of admiralty. *Aguilar* v *Standard Oil Co.,* 318 US 724 (1943); *Calmar S.S. Corp.* v *Taylor, supra.*

Considering the instant case in view of the historical light of the doctrine, the decision of the Sixth Circuit Court of Appeals would commence a process of eroding away that which has been furthered by admiralty courts and would cut away the very purpose for creation of the doctrine.

ARGUMENT

II

SCOPE OF MAINTENANCE AND CURE

That the traumatic incident which occurred aboard the vessel caused the vestibular labyrinthine disorder of which petitioner is permanently afflicted is uncontroverted.

> "To recover from maintenance and cure, petitioner must *first* show his injury or illness was incurred or became manifest while in the service of the vessel.

> The jury below resolved this question of fact by its verdict wherein it stated petitioner's accident aboard the SS Robert S. MacNamara was due to his sole negligence." *Respondent's Brief in Opposition to the Petition for Writ of Certiorari* (pp 8-9)

It is well established law that a sick or injured seaman must show facts which bring him within the scope of maintenance and cure benefits, *The Oceola,* 189 US 158 (1903); *Prendis* v *Central Gulf Steamship Co,* 330 F2d 893 (CA 4th, 1963); *Donovan* v *Esso Shipping Co,* 152 F Supp 347 (D.C.N.J., 1957); *The San Antonio,* 1 F Supp 231, Aff'd 61 F2d 623 (3rd Cir. 1932).

Petitioner met his burden when he proved to the jury that the traumatic incident giving rise to his disability occurred while he was in the service of the vessel (15a).

Respondent argued and the Sixth Circuit held (29a) that an injured seaman must do more than simply show that he became sick or injured while in the service of the vessel to come within the scope of maintenance and cure benefits; he must further affirmatively show that his disability is curable.

The Sixth Circuit holding would saddle a sick seaman with a two-step burden to come within the scope of maintenance and cure rights. That additional step is novel and contrary to precedented case law.

All a seaman must show to be entitled to maintenance and cure is that he was injured or medically afflicted while in the service of the ship. It is a one-step proposition. *Prendis* v *Central Gulf Steamship Co, supra.*

Although the *Prendis* court held that the seaman had not come within the scope because he was found not to

have been injured in the manner claimed, *Prendis* clearly indicates that what is meant by the *scope* of maintenance and cure merely is that a seaman became ill or injured while in the service of the ship. The *Prendis* court, pp. 895-896 stated:

> "As to the claim for maintenance and cure arising out of the injury, the Trial Court recognized that *all Libellant would have to show would be injury in the service of the ship* . . ." (emphasis ours)

The second step requirement is an onus on a seaman unconscionably placed. The Sixth Circuit holding would work to defeat the vital purpose of the doctrine in at least two instances that would inevitably arise.

> (1) Where a seaman lies helplessly ill with an undetermined or undeterminable diagnosis of his sickness, the holding would prevent urgent operation of the humanitarian doctrine for want of definitive medical pronouncement.
>
> (2) Where sickness or injury of a seaman is preliminarily diagnosed as curable and maintenance and cure payments are made, then subsequently the sickness is diagnosed as incurable, the holding would make the seaman a debtor to the shipowner for amounts previously paid.

Indeed, strapping an ill or injured seaman with responsibility of providing a shipowner with a medical diagnosis of a curable ailment before maintenance and cure benefits commence could be catastrophic. In our own times, and a whole century after *Harden* v *Gordon, supra,* troubled minds of modern jurists manifest in meeting the humanitarian aspect of the problem:

> "Members of the crew have no haven other than the ship. If sickness or hurt befalls them, what can they do? They cannot be left to die or fed to the sharks. The ship must perforce take care of them. There is likewise a humanity appeal which runs into the same necessity. It would be inhuman to leave a helpless man without succor. Someone should give him aid. Who other than the ship?" *The Quaker City*, 1 F Supp 840 (DO Pa 1931)

After it is established that the sickness or injury occurred while in the service of the vessel, that the seaman must further establish a medical diagnosis that the affliction is curable is in contravention of the 1936 General Conference of the International Labor Organization meeting at Geneva where a draft convention was submitted to the United States which was subsequently ratified by the Senate of the United States and proclaimed effective by our President on October 29, 1939 (146a). The Convention provides in relevant part as follows:

> "The shipowner shall be liable to defray the expense of medical care and maintenance until the sick or injured person has been cured, or until the sickness or incapacity has been *declared of a permanent character.*" 54 Stat. 1693. Article 4, paragraph 1. (149a) (emphasis ours)

This Court has never placed such a burden upon an injured seaman to come within the scope of maintenance and cure provisions as does the Sixth Circuit place upon Vella. This Court adopted the rule set down in the Convention in *Farrell* v *United States*, 336 US 511 517 (1949), and stated moreover that the Department of Labor possessed similar understanding of this traditional limitation on maintenance and cure.

Analytically, a condition precedent to the right to maintenance and cure is upon a sick seaman in showing he comes within the scope of the doctrine. A condition subsequent extinguishing the right may be shown by the shipowner when the seaman is cured or the disability is diagnosed and declared incurable.

This analysis is pointedly in consonance with relevant holdings by this Court appertaining scope of the doctrine.

DURATION OF MAINTENANCE AND CURE

The Shipowners Liability Conference of 1936 (146a) set the rule for the duration of maintenance and cure of a seaman who comes within the scope of the doctrine:

> "The shipowner shall be liable to defray the expense of medical care and maintenance until the sick or injured person has been cured, or until the sickness or incapacity has been *declared of a permanent character.*" 54 Stat. 1693. Article 4, paragraph 1. (149a) (Emphasis ours)

This Court applied the Draft Convention in *Farrell* v *United States, supra,* and amplified the rule by stating that a sick or injured seaman is entitled to maintenance and cure until his cure has reached maximum extent possible:

> "That the duty of the ship to maintain and care for the seaman after the end of the voyage only until he was so far cured as possible, seems to have been the doctrine of American Admiralty Courts prior to the adoption of the Convention by Congress, . . ."

This Court further stated in *Farrell* that the rule adopted by the Convention is the rule of our Admiralty Courts, *Lindgren* v *Shephard S.S. Co.*, 108 F2d 806 (2nd Cir. 1940);

The Josephine & Mary, 120 F2d 459 (1st Cir. 1941); *Luksich* v *Misetich,* 140 F2d 812 (9th Cir. 1944).

The Sixth Circuit holding (28a) that petitioner's "maximum medical recovery" in accordance with *Vaughan* v *Atkinson,* 369 US 527 (1962) at 531 was reached the moment the traumatic incident occurred is untenable. The appellate court below was cognizant of the testimony of respondent's own ear specialist, Dr. Heil, who responded to the question whether petitioner might be cured by treatment by testifying (29a):

> "No, not really. Treatment is primarily symptomatic for this condition. That is people with a vestibular disorder are apt to have intermittent episodes of dizziness which, on occasion, are somewhat more severe. Treatment is limited to those times when the patient is particularly dizzy. They can obtain some symptomatic relief with medication."

Certainly treatment for the symptoms of the vestibular labyrinthine disorder falls within the concept of the rule of this Court enunciated in *Farrell* and *Vaughan* that a seaman is entitled to maintenance and cure until his cure has reached maximum extent possible.

This Court has never addressed itself specifically to the question of whether a seaman's right to maintenance and cure is extinguished when the treatment involves palliative or amelioratory cure as distinguished from cure of the underlying disease. One who is afflicted with permanently disabling injuries such as severed limbs would certainly be attended in medical measures for relief of pain and discomfort. There would come a time when the cure of such pain would be reached even though the disability were permanent. Under that circumstance, cure within the rule

of "maximum extent possible" would entitle the seaman to maintenance and cure.

The more humane and appropriate holding relative to amelioratory cure is found in *Ward* v *Union Barge Line Corp.,* 443 F2d 565 (3rd Cir. 1971), where the Court stated at 572:

> "Defendant first contends that since decedent was totally and permanently disabled as of December 1, 1963, and since cure or amelioration of condition was not possible thereafter, the award of maintenance and cure was improper. In *Farrell* v *United States,* 336 U.S. 511, 69 S.Ct. 707, 93 L.Ed. 850 (1949), it was held that the liability for maintenance and cure does not extend beyond the time when the maximum possible cure has been effected. However, this limitation has been interpreted in this court to extend the obligation where medical care is needed to arrest further progress of the disease or to relieve pain. *Neff* v *Dravo Corp.,* 407 F.2d 228 (3d Cir. 1969); see also *Yates* v *Dann,* 124 F. Supp. 125 (D. Del. 1954), aff'd 223 F.2d 64 (3d Cir. 1955); *Gibson* v *United States,* 100 F. Supp. 954 (E.D. Pa. 1951) aff'd, 200 F. 2d 336 (3d Cir. 1952)."

Other courts have interpreted *Farrell* as giving credance to the "maximum degree of improvement of health" test. *Narzian* v *Nicholson Transit Co,* 174 F Supp 348 at 349, states as follows:

> "At most, recovery should not be extended beyond the time when the maximum degree of improvement of his health is reached."

The trial court stated (21a-22a) that Dr. Heil was the only physician competent to testify as to the permanency of petitioner's incapacity and that the ear specialist called by respondent to testify did not even examine the petitioner

until March 20, 1972. The first declaration as to the permanent characteristic of petitioner's disability was made by Dr. Heil at the time of trial on March 27, 1972.

It would appear, then, petitioner would be entitled to maintenance and cure from the date he left the vessel until Dr. Heil testified at the time of trial. It is petitioner's contention, therefore, that he is entitled to his full measure of maintenance and cure and that an Order of this Court should issue directing the trial court to enter an amended order of judgment for the appropriate amount of maintenance and cure award.

Respondent Ford's own salaried physician, Dr. David Charles Laderach, was called by respondent to testify at the trial. (54a). At dockside in a small clinic on Ford's River Rouge premises, Dr. Laderach by request of the seaman's superiors examined petitioner the day Vella left the ship. Dr. Laderach's records (61a) show that petitioner complained of soreness and a jumping sensation in the left parietal region for a three month duration. (That duration would have been from the date the incident occurred aboard the ship until the day Vella left the ship and was examined by Ford's physician.)

The physician's notes further indicated that petitioner explained the left parietal sensation as "electrical".

On cross-examination, Dr. Laderach finally conceded that his entry on the card stating "complaint may relate to tiny nerve branch contusion" was his diagnostic impression (792-80a), and then the question was put:

> "And you did not go further, did you, in exploring — You did not go further in exploring the matter?

Answer:

> "No. If you will notice, the fact that the patient was discharged meant that I thought the complaints were minor and this was merely a passing impression and I thought that the cold packs, which was a second thing I prescribed, would be of aid to this electrical feeling that the patient described in the left parietal area. Cold is an anesthetic and so I thought cold packs or ice packs would anesthetize the electrical area in the left parietal part of the skull."

Respondent's physician then gave petitioner a pack of Darvon tablets to take and sent him on his way never to return.

Respondent could have, but did not, taken measures to perform tests to diagnose plaintiff's vestibular labyrinthine disorder. It was not until some four years later that the disease was diagnosed and declared incurable by Dr. Heil at the time of trial (88a).

Respondent may have been moved to perform tests to detect petitioner's vestibular disorder had the advice of respondent's own physician been heeded.

On redirect examination (85a), Dr. Laderach testified that the basis for his ruling out vestibular damage of petitioner was his thorough examination the day petitioner left the vessel on June 29, 1968.

On recross examination of Dr. Laderach, the following resulted:

> Question: "And isn't it a fact, doctor, that with regard to neurological examinations, one may at one time, at a given time and place, show a negative testing and another time and place, without a great distance away in time, show, adopt an opposite type of response?

> Answer: I think you are pointing to the fact that many diseases are intermittent and they come and go. I can examine and have a negative impression during a period of remission and the disease flares up and a re-examination is done which may disclose positive findings. *That's why repeat visits are usually necessary.*" (Emphasis ours)

There were no repeat visits.

It is petitioner's contention that he is entitled to recover reasonable attorney fees for prosecuting his claim for maintenance and cure through trial and through levels of appellate review in accordance with the decision of *Vaughan* v *Atkinson, supra.*

SUMMARY

A seaman is a ward of the Admiralty Court. This court in *Calmar S.S. Corp.* v *Taylor, supra,* at 528 stated that the policy underlying the duty to provide maintenance and cure embraced the classical rhetoric of Justice Storey in *Harden* v *Gordon, supra*:

> "The reasons underlying the rule, to which reference must be made in defining it, are those enunciated in the classic passage by Mr. Justice Storey in *Harden* v *Gordon* . . ."

But the policy of this Court has been further defined in *Vaughan* v *Atkinson, supra,* at 531-532 with respect to the duty of a shipowner to provide maintenance and cure:

> "Admiralty courts have been liberal in interpreting this duty 'for the benefit and protection of seamen who are its wards' [*Calmar* v *Taylor*] Id., at 529, 58 S. Ct. at 654. We noted in *Aguilar* v *Standard Oil Co.*, 318 U.S. 724, 730, 63 S.Ct. 930, 933, 934, 87 L.Ed. 1107, that the shipowner's liability for maintenance and cure was among 'the most pervasive' of all and that it was not to be defeated by restrictive distinctions nor '*narrowly confined.*' Id., at 735, 63 S.Ct. at 936. *When there are ambiguities or doubts, they are resolved in favor of the seaman. Warren* v *United States,* 340 U.S. 523, 71 S. Ct. 432, 95 L.Ed. 503. (Brackets and emphasis added)

It is petitioner's contention that the appropriate statement of law relative to the issue involved is as follows:

> A seaman who contracted by trauma a permanent disease while in the service of the vessel comes within the scope of maintenance and cure benefits and shall continue to be entitled to those benefits until cured or until the disease is diagnosed and declared by medical authority that the maximum degree of improvement of the seaman's health has been reached.

The jury found that petitioner incurred his vestibular disorder aboard ship and the otolaryngologist, Dr. Heil, having performed an electronystagmographic test on petitioner was the only physician who diagnosed and declared petitioner's vestibular disorder as being incurable, and that occurred at the time of trial. It would follow that petitioner, therefore, would be entitled to maintenance and cure from the date he left the vessel until the time of trial when Dr. Heil testified on March 27, 1972.

As to further rights petitioner may have to maintenance and cure, *Farrell* at 519 sheds some light:

> "The government does not contend that if Farrell receives future treatment of a curative nature he may not recover in a new proceeding the amount expended for such treatment and for maintenance while receiving it."

Petitioner was directed by his superiors to go to Ford's River Rouge Clinic to be examined by respondent's hired physician, Dr. Laderach, whereupon he was given a cursory examination by a skeptical physician and sent away forever. It can only be concluded that the examination was performed to protect respondent from allegations in an eventual lawsuit that petitioner suffered physical disability. It is not the contention of petitioner that respondent's physician had a duty to examine; but once he undertook the examination, under the circumstances based on the testimony of Dr. Laderach, a duty arose to require repeated visits for additional examinations to determine the precise cause of the disability. This was not done and petitioner was required to prosecute his claim for maintenance and cure. This is clear indication that respondent was callous in its attitude and failed to make a proper investigation of petitioner's complaints of illness and because of that recalcitrance, petitioner was required to bring suit. Accordingly, based on the decision of *Vaughan*, petitioner contends he is entitled to reasonable attorney fees for retaining a lawyer to prosecute his claim for maintenance and cure through trial and through appellate review.

RELIEF

Petitioner seeks the following relief:

1. An order to issue reversing the decision of the Sixth Circuit Court of Appeals.

2. An order to issue remanding the cause to the trial court for entry of an amended order of judgment for an award of maintenance and cure from the date petitioner left the vessel June 29, 1968, to the date Dr. Heil testified, April 27, 1972, that petitioner suffered from a vestibular disorder and declared that the disease is incurable.

3. An order to issue remanding the cause to the trial court to determine reasonable attorney fees to be awarded petitioner for retaining a lawyer to prosecute his claim for maintenance and cure through trial and appellate review and to enter an order of judgment against respondent in accordance therewith.

4. An order to issue taxing costs for petitioner and against respondent for appellate proceedings.

Respectfully submitted,

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